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No. _____

In The

Supreme Court of the United States

October Term, 1995

WILLIAM L. JONES and J.H. WRIGHT,

Petitioners,

vs.

NORFOLK SOUTHERN CORPORATION and NORFOLK SOUTHERN RAILWAY COMPANY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether § 10 of the Federal Employers' Liability Act (FELA), 45 U.S.C. § 60, protects a railroad employee from discharge or discipline by the railroad for relaying a request from an injured co-employee to other fellow employees to meet with the injured employee's attorneys to furnish information concerning the injury. The Court of Appeals finding that this conduct was not protected by § 60 is contrary to the meaning of the language used in § 60 and its legislative intent, as well as being inconsistent with prior interpretations of § 60.

Whether the courts below misinterpreted 45 U.S.C. § 60 by basing their conclusions as whether an attempt to discipline an employee violated § 60 on whether the threatened investigation and discipline limited the free flow of information in the underlying FELA case filed by petitioner Jones, rather than also considering the effect of the threatened investigation and discipline on potential witnesses in other FELA cases. The approach taken by the courts below is contrary to *Hendley v. Central of Georgia Railroad Co.*, 609 F.2d 1146 (5th Cir. 1980), *cert. denied*, 449 U.S. 1093, 101 S.Ct. 890 (1981).

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PETITION FOR WRIT OF CERTIORARI

Petitioners, William L. Jones and J.H. Wright, respectfully pray that a writ of certiorari be issued to the United States Court of Appeals for the Fourth Circuit, to review the judgment of the Court of Appeals filed on June 9, 1995, affirming a judgment of the United States District Court for the District of South Carolina, at Spartanburg.

OPINIONS BELOW

The opinion of the Court of Appeals was filed on June 9, 1995, and appears herein as Appendix A. The opinion was unpublished. The order of the Court of

Appeals denying the petition for rehearing and suggestion for rehearing en banc filed by Petitioners was filed on July 5, 1995, and appears herein as Appendix B. The order and memorandum opinion of the district court was filed on June 20, 1994, and appears herein as Appendix C.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit in this matter was filed on June 9, 1995. Petitioners filed a timely petition for rehearing with suggestion for rehearing en banc, which was denied by the Court of Appeals by order filed on July 5, 1995. This petition for writ of certiorari is timely filed with ninety (90) days of the date of the denial of the petition for rehearing. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition presents questions concerning the construction and application of § 10 of the Federal Employers' Liability Act, 45 U.S.C. § 60, as set forth in Appendix D, herein.

STATEMENT OF THE CASE

This petition arises from a civil action seeking a permanent injunction against the Norfolk and Southern Railway Company, the Norfolk Southern Corporation, and their officers and employees F.W. Stevenson and Will Harden, filed in the United States District Court of the District of South Carolina, Spartanburg Division, pursuant to § 10 of the Federal Employers' Liability Act (FELA), 45 U.S.C. § 60. The verified complaint sought

temporary, preliminary and permanent injunctive relief, prohibiting respondents from conducting a formal disciplinary investigation against petitioner J.H. Wright (hereinafter "Wright"), an employee of respondents, or imposing discipline upon Wright. The formal disciplinary investigation was based upon charges that he acted in a disloyal manner and engaged in conduct unbecoming to an employee, in connection with a brief discussion he had with certain employees who were potential fact witnesses in a claim for damages for personal injuries which petitioner Jones had against the Norfolk Southern under the FELA, in violation of 45 U.S.C. § 60. The jurisdiction of the District Court was invoked under 45 U.S.C § 60 and 28 U.S.C § 1331.

The cause was tried before the Honorable William B. Traxler, Jr., United States District Judge, sitting without a jury, on June 6, 1994. On June 20, 1994, the District Court entered an order and judgment, denying the permanent injunction, and ending the action. The Court of Appeals affirmed, and petitioners now seek a writ of certiorari to the Court of Appeals.

Statement of Facts

Petitioner William L. Jones (hereinafter "Jones") is a blacksmith employee of the Norfolk Southern Railway Company (hereinafter "NSRC") employed at its Reclamation Plant at defendants' Hayne shop in Spartanburg, South Carolina. Jones has been a blacksmith employee of the railroad for 17 years. (JA 146-147 [T.71-72]) During his lengthy employment by the railroad, Jones has been exposed to smokey conditions in the Reclamation Plant. On approximately May 30, 1990, Jones sustained a pneumothorax/collapsed lung which he and his doctors

attributed to exposure to the smokey working conditions at that shop. Jones retained the law offices of C. Marshall Friedman, P.C. to represent him with respect to that injury. (JA 138 [T.63]) Jones was *not* referred to the lawyer by Wright. (JA 85 [T.10])[1]

In April of 1991 a representative from Jones' law firm traveled to Spartanburg, South Carolina to perform investigation in plaintiff Jones' case. (JA 86 [T.11]) Steve Southern, Steve Bayne and Fred Lambert – among others – were also blacksmiths, employed in the Reclamation Plant and were co-workers of Jones with whom the representative wished to meet. (JA 141 [T.66])

On the morning of Jones' attorneys' representative's trip to Spartanburg, Jones and Wright met in the parking lot outside work. (JA 86-87, 138 [T.11-12, 63]) Jones requested Wright to ask the three blacksmiths – Bayne, Southern, and Lambert – to meet with Jones' attorneys' representative at the hotel after work that afternoon. (JA 86, 139 [T.11, 64]) At the time of Jones' and Wright's discussion on the parking lot, Wright was under the impression that the blacksmiths were already aware of the meeting and that he, Wright, was in effect reminding them. (JA 128 [T.53]) In any event, Wright told Jones that he would be glad to go on Jones' behalf and ask the blacksmiths to meet with Jones' attorney. (JA 87 [T.12]) Wright did not think it was unusual for Jones to ask Wright to speak to Bayne, Southern and Lambert. (JA 87 [T.12]) As Wright explained, "Jones is a very quiet person.

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[1] In addition to the testimony on this issue defense counsel represented – in open court – that plaintiff Wright had nothing to do with plaintiff Jones retaining the law firm of C. Marshall Friedman, P.C. to represent him. (JA 86 [T.11])

He doesn't really come forward". (JA 87 [T.12]) According to Wright, Jones was concerned that because Jones was a black man, it would probably be considered offensive or maybe the white witnesses would not go to the meeting on Jones' behalf. (JA 87 [T.12]) Jones expressed the same concern because Jones is timid and he is a black man. (JA 139 [T.64]) The three blacksmiths, as well as Wright, are all white.

Following Wright's conversation with Jones, Wright spoke with each of the three blacksmiths that day at the shop during the lunch break. (JA 88-90 [T.13-15]) Wright told each of the three blacksmiths that he was requesting, on behalf of Jones, that they meet with Jones' attorneys' representative at the hotel. (JA 88-90 [T.13-15]) Each blacksmith agreed to do so. (JA 88-90 [T.13-15]) Wright's conversations with the blacksmiths lasted, in aggregate, about two minutes. (JA 89 [T.14]) After these two minute conversations, Wright had no further contact with either Jones or the blacksmiths concerning Jones' case. (JA 90 [T.15]) Wright did not discuss with any of the blacksmiths his knowledge concerning Jones' injury. (JA 90 [T.15]) Wright did not, at that time, have any discussion with Jones' attorneys. Wright did not go to the hotel to meet with Jones' representative or the blacksmiths. Nonetheless, all three of the blacksmiths went to the hotel and met with Jones' attorneys' representative. (*See*, Def. Ex. 4, JA 272; Def. Ex. 8, JA 278; JA 286; Def. Ex. 6)

In late, 1993, Wright was called to testify as a witness against the NSRC in a pending court case. (JA 103-104 [T.28-29]). Shortly after Wright furnished that testimony, Jones filed answers to an interrogatory propounded by NSRC in his FELA case (to which he had previously filed a legal objection) (Jt. Ex. 1; Def. Ex. 12; JA 35-38). In his

answer, Jones identified several employees, including Bayne and Southern, as persons with knowledge that the railroad had failed to ventilate its shop adequately (JA 37). After this answer was filed, NSRC's claim agent, respondent Will Harden, contacted and interviewed Bayne, Southern, and, later, Lambert, concerning Jones' case, and learned of Wright's conversation with the three men, relaying Jones request for them to meet with the investigator from Jones' law firm. Harden informed the plant manager, Mike Payne, of his discovery, and there were subsequent conversations which involved Harden, Payne, claims representative Carman Wiley, and Forrest Stevenson, who was about to succeed Payne as shop manager, as well as NSRC's labor relations and law departments.[2] It was clear that when Stevenson took over the shop in early 1994, Payne expected him to pursue that matter against Wright.

After two intitial but abortive attempts in early January, 1994 to subject Wright to a disciplinary investigation without furnishing him with any written notice of the charge against him or opportunity to obtain appropriate representation, NSRC served Wright with a written notice of a formal investigation on January 19, 1994 (Jt. Ex. 4 and Def. Ex. 9; JA 46; JA 97 [T.22]). The notice, in pertinent part, stated:

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[2] Harden and Wiley, as well as other NSRC representatives, had previously conducted a program called "Tell It Like It Is" at the Hayne Shop in 1993. Employees were required to attend this program, which was directed at convincing injured railroad employees not to hire lawyers. NSRC did not want attorneys involved in FELA claims. (JA 216-217, 235-237 [T. 155-56, 183-85]).

> "You are hereby notified to report to the conference room in the Hayne Shop Office Building, Spartanburg, S.C. on Monday, January 24, 1994 at 9:10 A.M. for a formal investigation to determine your responsibility for c nduct unbecoming an employee and acting in a disloyal manner by asking Blacksmiths S.L. Southern, F.J. Lambert, and B.S. Bayne to meet with a representative of a law firm at the Radisson Hotel, now known as the Quality Motel, Spartanburg, S.C. on **some date during 1991 or 1992, which law firm was then representing Blacksmith** W.L. Jones in **a lawsuit** against the carrier."

The new shop manager, Stevenson, – who prepared and signed the notice of investigation – was probably going to be the hearing officer at the formal investigation. (JA 101 [T.26]) Indeed according to the Hayne Shop supervisors who were most familiar with the disciplinary procedures, typically the first line-direct supervisor/foreman held the preliminary investigation. (JA 223 [T.169]) The assistant shop manager (Stevenson) held the formal investigation. (JA 223 [T.169]) Any appeals from the formal investigation were first to the shop manager. (JA 223 [T.169]) If there was going to be a higher appeal above the level of shop manager it would be between the union general chairman and the Norfolk Southern Labor Relations Department. (JA 223 [T.169]) Only after the repeated decisions by the company officials could the matter be processed to an arbitrator. The arbitrator hears no evidence, but only reviews the "record" applying a "substantial evidence" test. If there is any "substantial evidence" in the investigation transcript to support the company's determination that an infraction has occurred, the arbitrator must affirm the company's finding and discipline. There is no review of the merits of such a determination

by the Federal Courts. Federal Court review of such determinations is limited to three issues: (1) Whether there has been fraud or corruption perpetrated by a member of the arbitration board; (2) whether the arbitrator exceeded his jurisdiction; or (3) whether the National Railroad Adjustment Board followed the procedures of the Act. *See*, 45 U.S.C. § 153. The arbitrators' decision on the merits is final and conclusive.

Stevenson – who heard the federal court testimony, and who probably would have been the hearing officer at the formal investigation which was scheduled to be conducted on 1/23/94 (JA 254-255, 260 [T.202-203, 208]) – was of the opinion that Wright had engaged in conduct unbecoming an employee and had acted in a disloyal manner because he had assisted another employee of the NSRC in litigation against the company. (JA 259 [T.207]) Stevenson was of the opinion that Wright's violations occurred by virtue of his brief conversation with Lambert, Bayne, and Southern wherein Wright asked them to meet with Jones' attorneys' representative. (JA 260 [T.208]) Stevenson was forced to admit that based upon the evidence he heard during the federal court trial, he would have found Wright guilty of conduct unbecoming an employee and disloyalty for his limited involvement of asking Lambert, Bayne, and Southern to meet with Jones' attorney. (JA 260 [T.208]) In the same regard, Stevenson agreed that the discipline assessed against Wright based upon the evidence could include firing Wright. (JA 260 [T.208]) Robert Glen Lockery, from NSRC's Norfolk, Virginia Labor Relations Department, who best represents NSRC's upper management's viewpoint, essentially agreed with Stevenson. Lockery – who

also heard the federal court testimony – took no exception to the manner in which either of the preliminary investigations of Wright had been conducted and thought the charges were appropriate. (JA 267 [T.215]) In Lockery's opinion, Wright had violated principles inherent in the "basic employee/employer relationship" including the right of the company to "expect loyalty from their employees". (JA 266 [T.214]) This violation had occurred because plaintiff Wright had "inserted himself into a procedure in which he had assisted another employee in the prosecution of a personal injury lawsuit against the company." (JA 267 [T.215]) Respondents also concede that the two "charges" against Wright ("disloyalty" and "conduct unbecoming an employee") are not contained in any of the Rule Books and are not contained in any part of the written collective bargaining agreement between the parties. (JA 265, 268 [T.213, 216]) Consequently, neither the Rule Books nor the written collective bargaining agreement defines what constitutes "loyalty" or what constitutes "disloyalty". Likewise, neither the Rule Books nor the written collective bargaining agreement defines what constitutes "conduct unbecoming an employee". There are, consequently, no written rules by which an objective, outside observer can determine whether an employee's conduct does or does not constitute "disloyalty" or "conduct unbecoming an employee". Nor can an employee of NSRC know whether his conduct in voluntarily providing information may – years later – be considered to constitute "disloyalty" or "conduct unbecoming" and consequently cause for termination.[3]

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[3] As one of the employees, John Thompson, noted the NSRC's attempts to discipline Wright has resulted in

Fortunately, the formal investigation scheduled for 1/23/94 did not take place at that time. Instead, Wright requested a postponement of the formal investigation for five different reasons set forth in his letter dated 1/20/94. (See Jt. Ex. 5, Def. Ex. 10; JA 44) This action was then filed on January 21, 1994 contending that respondents had and would violate 45 U.S.C. § 60. This suit alleged, *inter alia*, that (Complaint ¶ 12, JA 18):

> "The formal investigation is not being conducted in a fair and impartial manner, but is instead being conducted for the purpose of disciplining and firing Mr. Wright and **intimidating witnesses** to Mr. Jones' injury in an effort to minimize or eliminate defendants' liability to plaintiff Jones in his civil lawsuit and **to further intimidate and harass defendants' employees from cooperating with and providing information to representatives of other employees who will maintain similar civil lawsuits under the provisions of the Federal Employers' Liability Act in the future.**"

The relief sought included a temporary restraining order/temporary injunction. The District Court heard the matter without a jury, on June 6, 1994. The parties stipulated to certain facts (JA 30-51) and the abbreviated trial record was created. In addition to the facts and evidence set forth above, the district court also heard substantial

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employees' concern about being put on the "list". (JA 179 [T.104]) The railroad supervisors and officials obviously have discretion in determining whether to bring charges against employees. (JA 180 [T.105]) Employees are well aware that inconsequential actions that are typically ignored can become a basis for bringing the employee up on charges, disciplining him over nothing, and result in the loss of his job. (JA 179-180 [T.104-105])

and uncontradicted testimony from 6 witnesses on the pernicious effect that the respondents' attempts to investigate and discipline Wright have had upon employees voluntarily providing information in this and other FELA actions. The three blacksmiths – Southern (JA 146-158 [T.71-83]), Bayne (JA 158-168 [T.83-93]), and Lambert (JA 163-177 [T.93-102]) – testified. Southern was shocked by the railroad's efforts to discipline Wright. (JA 150 [T.75]) Both Southern and Lambert indicated they were intimidated by the railroad's treatment of Wright and, therefore, hesitant about going to Tennessee to testify in Jones' case. (JA 158, 172 [T.83, 97]) Bayne testified that his decision as to whether or not he would "go testify in [Jones'] trial" in Tennessee "might depend on the outcome of this case today." (JA 168 [T.93]) Other Hayne Shop employees – John B. Thompson (JA 177-186 [T.102-111]), Allen Dawkins (JA 186-191 [T.111-116]), and Ben Johnson (JA 191-199 [T.116-124]) – confirmed that the railroads' attempts to investigate and discipline Wright had sent shock waves through the Hayne Shop and caused employees – including them – to believe that their jobs might be jeopardized by coming forward and voluntarily providing information concerning employee injuries. (JA 179-180, 187-188, 194-196 [T.104-105, 112-113, 119-121])

On June 20, 1994, the District Court entered its order and judgment denying plaintiffs' request for a preliminary injunction and ending the action. (JA 52-66) The Court of Appeals affirmed. Petitioners now respectfully request this Court to issue its writ of certiorari to the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The Purpose And Intent Of 45 U.S.C. § 60, And It's Interpretation By The Federal Courts.

Section 10 of the Federal Employers' Liability Act (FELA), 45 U.S.C. § 60 (hereinafter § 60), provides in pertinent part as follows:

> Any contract, rule, regulation, or device, whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whosoever, by threat, intimidation, order, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000.00 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: . . .

The first part of the statute declares void any device that operates to prevent employees of the carrier from voluntarily furnishing information to a person in interest. The remainder of the statute sets forth a criminal offense which prohibits anyone from disciplining or trying to discipline any employee for furnishing information, and provides penalties. The reported cases to date deal with only the first part of the statute. Petitioners' research has not uncovered any reported cases involving an attempt to obtain a conviction under the criminal portion of the statute.

The Fourth Circuit itself described § 60, and its purpose and intent, in *Cavanaugh v. Western Maryland Ry. Co.*, 729 F.2d 289, 293 (4th Cir. 1984), *cert. denied*, 469 U.S. 872, 105 S.Ct. 222 (1984), as follows (bracketed material and emphasis supplied):

> Section 10 [45 U.S.C. § 60] proscribes any "device" the "purpose, intent or effect" of which would "prevent employees of any common carrier from furnishing voluntarily information to a person in interest to the facts incident to injury or death of any employee . . . " As the language plainly indicates, this section was intended to prevent the railroad from making inaccessible to an injured employee other railroad employees whose testimony might be helpful to the injured employee if he chose to sue the railroad or, as the Court in *Hendley v. Central of Georgia R. Co.*, 609 F.2d 1146, 1150-51 (5th Cir.1980), said: "This section prohibits a railroad from disciplining or attempting to discipline an employee for furnishing information to an FELA plaintiff." The purpose of the statute is stated at greater length in *Stark v. Burlington Northern, Inc.*, 538 F.Supp. 1061, 1062 (D.C.Colo.1982), where the Court said:
>
> > "The intent of the section was to attempt to equalize the access to information available to the highly efficient claim departments of the railroad and to the individual F.E.L.A. claimants, and to prohibit the promulgation and enforcement of rules which would inhibit the free flow of information to claimants. See Senate Report No. 661, 76th Cong., 1st Sess. 2, 5 (1939). Its authors recognized the danger 'that railroad agents would coerce or intimidate employees to prevent them from testifying.'

> *Hendley, supra,* at 1150 [609 F.2d] The broad prohibition, 'by threat, intimidation, order, rule, contract, regulation or device,' indicates that § 60 was designed to prevent any direct or indirect chill on the availability of information to any party in interest in an F.E.L.A. claim. Therefore, the Act is to be read liberally."

In Senate Report No. 661, 76th Cong., 1st Sess. at 5 (1939), referred to above, it was noted that (emphasis supplied):

> In relation to the investigation of facts upon which claims for injuries are based, *humanity and justice demand that injured railroad men be accorded as much freedom of action as their employers enjoy.*

Thus, the Courts of Appeals have generally recognized the legislative purpose underlying § 60, and that § 60 is to be read liberally in order to achieve that purpose.[4] Similarly, the Eighth Circuit has stated that: "Section 60 should be interpreted in the context of the broad remedial purpose behind the Federal Employers' Liability Act (45 U.S.C. § 51 *et seq.*)." *Sheet Metal Workers International Association v. Burlington Northern Railroad Co.*, 736 F.2d 1250, 1252 (8th Cir. 1984). *See Sowards v. Chesapeake & Ohio Railway Co.*, 580 F.2d 713, 714 (4th Cir. 1978) (courts have always "liberally construed" FELA in favor of plaintiffs). "Section 60 forbids a railroad to retaliate against an employee who helps or testifies for a *co-worker* in the *co-worker's* FELA claim." *Mayon v. Southern*

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[4] *See also Reinhardt v. Benefit Trust Life Insurance Company,* 819 F.2d 494, 495 n.2 (4th Cir. 1987) (cautioning against a "restrictive" reading of § 60).

Pacific Transportation Co., 805 F.2d 1250, 1253 (5th Cir. 1986) (emphasis in original).

The federal courts clearly have jurisdiction to enjoin an investigation or disciplinary action which violates § 60. *Hendley v. Central of Georgia Railroad Co.*, 609 F.2d 1146, 1151-52 (5th Cir. 1980), *cert. denied*, 449 U.S. 1093, 101 S.Ct. 890 (1981). The question of whether a particular action or investigation violates § 60 involves the interpretation of a federal statute, and is properly within the jurisdiction of the federal courts. Because the issue is one of statutory interpretation, and does not involve interpretation of the collective bargaining agreement, it is not to be determined by an adjustment board under the Railway Labor Act. *Hendley*, 609 F.2d at 1150-51.

In *Hendley*, the railroad tried to discipline and discharge an employee after the completion of the trial in the underlying FELA case. The district court concluded that it did not have jurisdiction to enjoin the disciplinary action, reasoning that since the FELA case had already been tried, there was no possibility that evidence in that case could "be suppressed through coercion by the railroad." 609 F.2d at 1149. The Fifth Circuit reversed, and explained its reasoning in part as follows:

> Finally, a district court's ability to enjoin a hearing or conduct which violates § 60 is essential to effectuate the purpose of the section. In Kozar v. Chesapeake & Ohio Railway, Co., 320 F.Supp. 335 (W.D.Mich.1970), affirmed in part and vacated in part, 449 F.2d 1238 (6th Cir.1971), a district court recognized the intimidating effect of any exercise of a railroad's power against an FELA witness:
>
> > [R]ailroad employees are subject to considerable pressure if called to give testimony against their employer. This pressure need

> not be the result of direct threats or arm-twisting; it is not necessarily the object of deliberate railroad policy. But whether by design or accident, the facts remains that these working men, through numerous contacts with supervisors and claim agents during the discovery process, often believe that a wrong step-defined by railroad rules (real or apparent) and interpreted by railroad officials-may result in sanctions, and that the wrong testimony-potentially costing the railroad large amounts of money-might arouse the displeasure of those in control of their livelihood. The tremendous power of a corporation like the Chesapeake and Ohio Railroad, coupled with its aggressive efforts to defeat the claims of those injured by its activities-even when the victims are their most valuable employees-can overawe and even cower those individuals upon whom an opposing party must rely to substantiate his claim.

320 F.Supp. at 369-70. If a railroad is allowed to discipline an employee for furnishing information to an FELA plaintiff, and the employee is required to submit to the hearing and to process his claim through arbitration before finally reaching the federal courts, the coercive effect is overwhelming. Employees who consider testifying in an FELA case will understandably hesitate if they know they may be forced, as Hendley was, to undergo a formal investigation and possibly suspension for a lengthy period of time. The fact that the employee may ultimately prevail is of little

> assurance to one who faces possible unemployment for a year or more. Thus, the disciplinary procedure not only violates the mandate that an employer refrain from disciplining an employee for furnishing information, it also becomes a device the "effect of which shall be to prevent employee of any common carrier from furnishing voluntarily information to a person in interest." 45 U.S.C. § 60.
>
> For these reasons, we hold that a district court has jurisdiction, even after the conclusion of an FELA case, to enjoin any proceeding which is violative of § 60.

609 F.2d at 1152-53. No showing of irreparable harm is required for injunctive relief to issue if a violation of § 60 has been shown as set forth in *Hendley. Gonzalez v. Southern Pacific Transportation Co.*, 773 F.2d 637, 641-42 (5th Cir. 1985).

The federal courts have interpreted § 60 liberally and broadly, in accordance with its purpose, subject to only three basic limitations, none of which are present in the case now before the Court. Those courts which have considered the question have held that § 60 does not protect the FELA plaintiff himself from discharge in retaliation for having filed suit,[5] and does not require the dismissal of a counterclaim against the FELA plaintiff for

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[5] *E.g., Landfried v. Terminal Railroad Association of St. Louis*, 721 F.2d 254 (8th Cir. 1983), *cert. denied*, 466 U.S. 928, 104 S.Ct. 1712 (1984); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983); *Bay v. Western Pacific Railroad Co.*, 595 F.2d 514 (9th Cir. 1979).

property damage.[6] An employee who deliberately gives information he knows to be false concerning an injury is not protected by § 60 from discipline based upon dishonesty.[7] And an employee who serves as a runner for a plaintiff's lawyer, acting as the agent of the lawyer in soliciting and urging an injured employee to retain that lawyer, and in personally taking an employee to meet with the lawyer for the lawyer to solicit the retainer, is not protected by § 60.[8] It is most respectfully submitted that the latter situation is entirely distinguishable from and dissimilar to that in the instant case, in which respondent has conceded that Wright played no part in securing the retainer of Jones' attorneys. As will be shown below, Wright's conduct, in relaying Jones' request that the three employees in this case meet with the investigator for Jones' lawyers, was and should be protected under § 60.

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[6] *Cavanaugh v. Western Maryland Ry. Co.*, 729 F.2d 289 (4th Cir. 1984), *cert. denied*, 469 U.S. 872, 105 S.Ct. 222 (1984); *Sprague v. Boston and Maine Corporation*, 769 F.2d 26 (1st Cir. 1985). *But see Stack v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 615 P.2d 457 (Wash. en banc 1980) (carrier could not file counterclaim or third party claim for property damage in FELA case, discussed in *Cavanaugh*); *Illinois Central Gulf R. Co. v. Haynes*, 592 So.2d 536 (Ala.1991) (railroad could not file third party claim for indemnity for personal injuries against fellow employee under FELA).

[7] *E.g., Gonzalez v. Southern Pacific Transportation Co.*, 773 F.2d 637, 642 (5th Cir. 1985); *Hornsby v. St. Louis Southwestern Ry. Co.*, 963 F.2d 1130 (8th Cir. 1992).

[8] *E.g., Woodrum v. Southern Ry. Co.*, 750 F.2d 876, 883 (11th Cir. 1985). *But see Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 84 S.Ct. 1113 (1964) (union policy of maintaining list of recommended FELA attorneys and furnishing the same to its members protected conduct under the First and Fourteenth Amendments).

The holding of the Court of Appeals to the contrary should be reviewed and reversed by this Court.

II. The Conduct Of Plaintiff Wright In This Case, Relaying A Request From FELA Plaintiff Jones, To His Railroad Coemployees To Meet With A Representative Of Jones' Law Firm To Furnish Information Concerning Jones' Claim, Was Protected Conduct Under 45 U.S.C. § 60.

The heart of the Court of Appeals' construction of § 60 in this case was as follows (App. at A-7 to A-8):

> The record below reflects that Wright acted as a liaison between Jones, his counsel, and the three potential witnesses, Lambert, Bayne and Southern. Wright, having no personal knowledge of facts incident to Jones's injury, was not a potential witness in the underlying FELA action. Instead, Wright contacted Lambert, Bayne and Southern on behalf of Jones and requested that they meet with Jones's counsel to disclose their understanding of the facts giving rise to Jones's FELA claim. Although perhaps of assistance to Jones in the investigation of his case, Wright's well-meaning actions lack two essential attributes necessary to receive § 60 protection. First, to the extent Wright's actions as an intermediary can be characterized as the "furnishing" of "information," the information he provided was not "as to the facts incident to the injury" of Jones. Wright was not personally familiar with any of the facts or circumstances of Jones's accident. He acted merely as a messenger for Jones. Indeed, the district court explicitly found that, rather than involving Wright as an intermediary, Jones himself could have asked Lambert, Bayne and Southern to meet with his legal counsel concerning the underlying FELA claim.

> Second, rather than conveying information of any kind to a "person interest," Wright merely passed a message from Jones to Lambert, Bayne and Southern requesting that they meet with Jones's lawyer. None of these potential witnesses had an interest in the outcome of Jones's underlying FELA claim, nor were they parties in the case below. Thus, the nature of the information Wright imparted and identity of the recipients of his message preclude us from according § 60 protection to his conduct.

In deciding that Wright's conduct in this case was not protected by § 60, the Court of Appeals declined to follow the one decided § 60 which is most similar on its facts to the instant case, *Stark v. Burlington Northern, Inc.*, 538 F.Supp. 1061 (D.Colo.1982) (cited with approval and relied upon by the Fourth Circuit in *Cavanaugh v. Western Maryland Ry. Co.*, 729 F.2d 289, 293 (4th Cir. 1984), *cert. denied*, 469 U.S. 872, 105 S.Ct. 222 (1984)). Stark, like Wright in the instant case, had not witnessed the incident in which his fellow employee, the wife of the FELA plaintiff, had been killed. Stark had no personal knowledge of the witnesses or the event. A law firm investigator showed Stark a photo from the death investigation and asked if Stark could identify any of the persons in the photo. Stark was unable to do so. However, Stark then voluntarily returned to the investigator and offered to undertake to find out the names of the persons in the photo. He took photographs to the police station and spoke with a police officer who identified one person and gave him the name of another railroad employee to contact for further inquiry. Stark followed up and contacted that employee and thereafter reported what he had learned to the law firm investigator. His total effort took about 30 minutes. The railroad sought to discharge Stark,

and both Stark and the FELA plaintiff filed suit under § 60 to enjoin the railroad from disciplining or discharging Stark. As in the instant case, the railroad sought to justify its actions by the claim that Stark's actions constituted improper disloyalty to the company. The district court granted summary judgment for plaintiffs and issued the requested injunction. The district court's analysis of § 60 in *Stark* is directly applicable to the case now before this Court:

> In establishing the criteria for protected conduct that falls within the statutory language of "furnishing voluntarily information," a balancing test must be used. On one side are the goals of § 60 in promoting free and equal access of information to F.E.L.A. claimants. On the other side are the railroad's legitimate interests in the loyalty of its employees and in protecting its confidential or privileged records. Factors to be weighed include whether the employee's conduct could be characterized as clandestine, as extensive, or as a "fishing expedition" for general information rather than responsive to a specific question. Another factor is whether the employee has become an agent of the investigator or has been compensated for his activity.
>
> Here, plaintiff Stark's conduct did not result in the disclosure of any confidential information. The photographs were part of the police record, not company records, and the identity of the persons was not confidential information.
>
> Plaintiff Stark did not obtain or transmit the information in a clandestine manner; far from being secretive, he approached another railroad employee openly. His inquiries were not extensive in time, space or subject matter. In a very brief period of time, he sought the answer to a single specific inquiry within a limited locale.

> There was no generalized fishing expedition as to what had happened, to whom, where or when. His conduct involved only the identification of persons photographed at the accident scene. This conduct is within the protection of § 60.

Stark v. Burlington Northern, Inc., 538 F.Supp. 1061, 1063 (D.Colo.1982).

Given that Stark's conduct – undertaking to learn the names of the persons in the photograph, information he did not already have, and furnishing those names to the law firm investigator so that the investigator could then speak to them – was held to be protected by § 60 in that case, then manifestly Wright's activity – which consisted solely of passing along a request from plaintiff Jones himself to the three witnesses to speak to a law firm investigator – was also protected by § 60. By complying with Jones' request that he ask Lambert, Bayne and Southern to meet with the representative from Jones' law firm, when Jones was unsure how they would respond to a request from him alone, Wright was literally assisting in "furnishing voluntarily information" to Jones, a party in interest, and his authorized representatives, and thus Wright's conduct fell within the plain and unambiguous meaning of the statute. The term "furnish" or "furnishing" has a broad meaning and is typically considered synonymous with "to provide" or "to supply".[9] It is not necessary that Wright be the "source" or the "origin" of the information so long as he acted to "furnish" or to assist in "furnishing" the information.

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[9] *See, e.g., Black's Law Dictionary*, 6th edition, 1990, p. 675; *Webster's Ninth New Collegiate Dictionary*, 1987, p. 499.

As set forth above, the Congressional intent in enacting § 60 was to ensure that in investigating injury claims "injured railroad men be accorded as much freedom of action as their employers enjoy." Senate Report No. 661, 76th Cong. 1st Sess. at 5 (1939). It is respectfully submitted that the railroads would certainly believe that a claim agent for the railroad could convey a request to meet with a witness employee through a supervisor or fellow employee. It was the intent of § 60 to allow injured employees that same freedom. Thus, the Court of Appeals misconstrued § 60 in holding that Wright's conduct in this case was not protected by the statute.

The district court order analogized this case to *Woodrum v. Southern R. Co.*, 750 F.2d 876 (11th Cir.), *cert. denied*, 474 U.S. 821, 106 S.Ct. 71 (1985) (App. at C-17 to C-18), and the Court of Appeals also relied upon *Woodrum* (App. at A-6 to A-7, fn.2). But reliance on *Woodrum* is entirely misplaced in this case because critical difference between the two cases which render *Woodrum* distinguishable from and completely inapplicable to the instant case.

Woodrum was not a § 60 action to enjoin an investigation or threatened disciplinary action, but was instead a petition to review a decision of a public law board (special board of adjustment) under the Railway Labor Act. The federal courts have repeatedly held that the standard of review of a decision of an public law board or adjustment board under the Railway Labor Act is "among the narrowest known to the law." *Diamond v. Terminal Railway Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970). See 45 U.S.C. § 153 First (q). Woodrum was charged with arranging for a fellow employee, Eddie Lee Robinson, to meet with an attorney for purposes of having the

employee retain the attorney in an FELA claim, and in personally escorting the employee to meet with the attorney. After an investigation, Woodrum was discharged, and the discharge was appealed to a public law board under the Railway Labor Act. The Public Law Board denied Woodrum's claim challenging the discharge, finding that there was " 'sufficient substantive evidence of probative value' that 'claimant was acting as the agent for a personal injury attorney specializing in cases against railroads under the [FELA] and attempted, by subterfuge, to persuade an allegedly injured employee (not a member of Claimant's organization) to retain attorney to sue carrier.' " 750 F.2d at 879 (bracketed material in original). The Board characterized this conduct as "industrial 'ambulance chasing' ". 750 F.2d at 879. After the Board rendered its decision, Robinson recanted the testimony which he had given at the investigation which had been damaging to Woodrum, stating his prior written statements, and thus his later testimony at the investigation, were untrue and had been dictated to him by a railroad claim agent.

Woodrum thereafter filed a petition for review of the Public Law Board decision in the district court, alleging that the decision was based wholly on false testimony given in the investigation by Robinson and the claim agent, and that the Public Law Board decision was therefore without foundation in reason or in fact and was procured by fraud. The Court of Appeals, employing the narrow standard of review set forth above, found the Public Law Board had been entitled, under that standard of review, to rely on Robinson's original testimony notwithstanding his later recantation, and that fraud on the part of the claim agent, if any, could not be attributed to

the railroad or the railroad member of the Public Law Board for purposes of setting aside the award. The issues before the Court in *Woodrum* thus related primarily as to whether Robinson's recantation entitled Woodrum to have the Board decision set aside.

The brief discussion of § 60 in *Woodrum* assumed the truth of the facts as to Woodrum's conduct as set forth in the Board decision: that Woodrum had arranged a meeting between Robinson and the attorney for the purpose of having Robinson retain the attorney, and had personally taken Robinson to the hotel suite for the meeting. 750 F.2d at 883. The Court of Appeals simply held that this particular conduct was not protected by § 60. The Court's conclusion is completely in line with the legislative history of § 60. Section 60 as first proposed in Congress did not limit the parties to whom information could be voluntarily disclosed to "person[s] in interest." That language was added after the railroads protested that the absence of such a limitation would encourage investigations by ambulance chasers and shysters. See *Gonzalez v. Southern Pacific Transportation Co.*, 755 F.2d 1179, 1184 (5th Cir. 1985) and dissenting opinion of Judge Hill, 755 F.2d at 1187-88, *opinion withdrawn and panel rehearing granted*, 773 F.2d 637 (5th Cir. 1985); *Sheet Metal Workers International Association v. Burlington Northern Railroad Co.*, 736 F.2d 1250, 1252-53 (8th Cir. 1984). In the Senate Judiciary Committee Report regarding § 60, the Committee stated directly:

> The Amendment fully protects the employer against abuses which might result from so-called ambulance chasing by limiting those to whom information may be given without restriction to the actual parties in interest or

> those who have been duly authorized to represent them.

Senate Report No. 661, 76th Congress, 1st Sess. 5 (1939). In interpreting § 60 to include information furnished to attorneys already consulted by the injured party for possible retention, in *Sheet Metal Workers International Association v. Burlington Northern Railroad Co.*, 736 F.2d 1250, 1252 (8th Cir. 1984), the Eighth Circuit stated:

> We are cognizant of Congress' concern that § 60 not be interpreted to foster or condone "ambulance chasing." See supra note 1. However, this is not a case where unretained attorneys have attempted to seek out and question railroad employees about possible accidents for the purpose of landing a lucrative FELA case.

Thus, Woodrum's conduct, "acting as the agent for a personal injury attorney specializing in cases against railroads under the [FELA] and attempt[ing], by subterfuge, to persuade an allegedly injured employee (not a member of Claimant's organization) to retain attorney to sue carrier," *Woodrum*, 755 F.2d at 879 (bracketed material supplied), fell within the core of conduct which Congress expressly decided to exclude from the coverage of § 60.

By contrast, in the instant case, it is undisputed that Wright did not refer Jones to an FELA lawyer, and that Wright played no part in Jones' decision to retain counsel or in Jones' choice of counsel (JA 85-86 [T.10-11]). Indeed, the railroad represented to the district court that "we have never asserted that Mr. Wright had any part in getting Mr. Jones to Mr. Friedman's law firm, . . . " (JA 86 [T.11]). Further, unlike Woodrum, Wright did not attend and did not accompany Jones, Lambert, Bayne or Southern to any meeting with the representative of the law firm (Order ¶ 20). Wright's conduct was limited to a brief

conversation in which Jones asked him to request Lambert, Bayne and Southern to meet with Jones' counsel, and a brief conversation with the three men to comply with Jones' request.

Except for the happenstance that both cases somehow involve meetings with lawyers in hotel rooms, *Woodrum* and the case now before the Court are entirely dissimilar in all material respects. To the extent that the Court of Appeals and the district court relied upon *Woodrum* or its reasoning in finding that Wright's conduct in this case was not protected by § 60, they were clearly in error. The proper construction of § 60 in this case appears in *Stark*.

III. In Determining Whether There Was A Violation of § 60, The Court Of Appeals Misconstrued § 60 By Focusing On The Narrow Issue Of Whether The Free Flow Of Information Had Been Affected In The Single Underlying FELA Case Involving Jones. The Proper Inquiry Under § 60 Must Also Extend To The Impact Of The Actions Of Respondents In This Case Upon Potential Witnesses In Future FELA Claims.

The opinion of the Court of Appeals and the order of the district court in this case were also based upon the erroneous assumption and false premise that petitioners must show that the railroad's announced investigation of Wright "had the effect of stifling the free flow of information relative to Jones and his case" (App. at A-8, C-10 to C-11) in order to show a violation of § 60. (See District Court Order, App. at C-10 to C-13.) Thus, the focus of the Court of Appeals and of the district court was not on whether the action against Wright would have the effect of cutting off the free flow of information or making

employees reluctant to furnish information in the future in other injuries, but on the narrow question of whether it had been shown that such had taken place in Jones' case. However, the argument that the plaintiff in a § 60 action must show that the railroad's action will have the effect of cutting off the flow of information in the underlying FELA case in order to obtain injunctive relief under § 60 was explicitly rejected in *Hendley*. As set forth above, in *Hendley*, **the railroad did not seek to impose discipline on the § 60 plaintiff until after the underlying FELA was concluded.** The district court denied injunctive relief on the ground that when the underlying FELA case has been concluded **"there is no possibility that evidence will be suppressed through coercion by the railroad."** 609 F.2d at 1149. The Court of Appeals reversed, clearly rejecting that reasoning as a basis for denying relief. The Court of Appeals instead emphasized the coercive effect that a violation of § 60 has on other employees who have to decide whether to furnish information or give testimony in the future. In *Gonzalez v. Southern Pacific Transportation Co.*, 773 F.2d 637, 642 (5th Cir. 1985), the Court of Appeals stated that the harm to be prevented by injunctive relief in § 60 cases is the "coercion of FELA witnesses, which, if allowed to flourish, would undercut the Act." This, too, is clearly a reference to the coercive impact of investigations and disciplinary actions contrary to § 60 on witnesses in other and future FELA cases, and not simply the one which may be directly at hand.

The district court's findings of fact acknowledge the "great concern" which has been generated among employees by the investigation of Wright and the "fear . . . that the railroad can, and will, use any excuse to terminate any employee." (Order, ¶ 41; App. at C-11). The

district court's narrow focus, adopted by the Court of Appeals, on whether there had been a stifling in the flow of information in Jones' case, however, led the court to explicitly discount the evidence it clearly saw of coercion of employees on the ground that the employee involved either was not involved in Jones' case (Order, ¶ 41 (d), (e), (f), App. at C-12) or because, in the case of those involved in the Jones' case, they had already come forward and had no further information to give that had not already been disclosed (Order, ¶ 42 (c), (d), App. at C-10 to C-11). Further, the district court's finding, which was cited by the Court of Appeals (App. at A-8) and which served as the factual counterpart of this misconstruction of the statute, that "the investigative process has *not* had the effect of stifling the free flow of information relative to Jones and his case" (Order, ¶ 42, App. at C-11) (emphasis in court's order) is clearly erroneous. The court's findings acknowledge that Bayne now wonders if he should "remain quiet" and that he testified that his willingness to testify in Jones' case depends on the action of the court decision in this case (Order, ¶ 42 (c), App. at C-11 to C-12). Bayne's testimony was quite clear that if Wright is protected by the courts under § 60, Bayne will feel that he can testify without coercion by the carrier. If not, he will take that as a message about what the carrier can and will do to him, and decline to voluntarily appear and testify live at a trial.

Thus, the Court of Appeals misconstrued § 60 in this fundamental respect.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court of Appeals misconstrued § 60 in holding

that Wright's conduct was not protected by the statute. This is an issue which has immense practical importance to the manner in which FELA claims are investigated, and to the extent to which railroads will be permitted to use extra-judicial coercive tactics to intimidate claimants and witnesses in FELA cases. This Court's writ of certiorari should issue to review the decision of the Court of Appeals.

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM L. JONES; J. H. WRIGHT, *Plaintiffs-Appellants,* v. NORFOLK SOUTHERN CORPORATION; NORFOLK SOUTHERN RAILWAY COMPANY; F.W. STEVENSON; WILL HARDIN, *Defendants-Appellees.*	No. 94-1947

Appeal from the United States District Court
for the District of South Carolina, at Spartanburg.
William B. Traxler, Jr., District Judge.
(CA-94-178-7-021)

Argued: April 5, 1995

Decided: June 9, 1995

Before NIEMEYER, HAMILTON, and WILLIAMS,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Kenneth Even Rudd, C. MARSHALL FRIEDMAN, P.C., St. Louis, Missouri, for Appellants. Frank Huger Gibbes, III, GIBBES & CLARKSON, P.A., Greenville, South Carolina, for Appellees. **ON BRIEF:** C. Marshall Friedman, Douglas K. Rush, C. MARSHALL FRIEDMAN, P.C., St. Louis, Missouri, for Appellants. Stephanie H. Burton, GIBBES & CLARKSON, P.A., Greenville, South Carolina; William P. Stallsmith, Mark Perreault, NORFOLK SOUTHERN CORPORATION, Norfolk, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

In this Federal Employers' Liability Act (FELA) suit, 45 U.S.C. §§ 51-60, Appellants William L. Jones and J.H. Wright appeal the district court's entry of judgment following a bench trial and denial of their request for a permanent injunction in favor of Appellees Norfolk Southern Corporation, Norfolk Southern Railway Co. (collectively Norfolk Southern), F.W. Stevenson, and Will Hardin. Appellants contend that the district court erred in concluding that 45 U.S.C. § 60 does not protect Wright from disciplinary proceedings initiated by Norfolk Southern in retaliation for arranging a meeting regarding an

on-the-job injury. Upon careful consideration of the arguments by counsel and review of the trial record, we affirm.

I

Jones and Wright are employed by Norfolk Southern, respectively, in the positions of blacksmith/welder and carman. On May 30, 1990, Jones allegedly suffered an injury in the course of his employment. Jones thereafter retained the law firm of C. Marshall Friedman, P.C. to represent him and to pursue a FELA claim against Norfolk Southern. On April 19, 1991, Jones requested that Wright ask three other Norfolk Southern employees, S.L. Southern, F.J. Lambert, and B.S. Bayne, to speak with a representative of the Friedman law firm about Jones's lawsuit. During the lunch break that day, Wright spoke with Southern, Lambert, and Bayne who, thereafter, met with a representative from the Friedman firm. Wright was not present at the meeting nor was he identified by Jones as a witness in his FELA suit later filed in December of 1991.

During subsequent recorded statements made by Southern, Lambert, and Bayne to William Harden, a Norfolk Southern claim agent, Harden became concerned that Wright had served as an intermediary, arranging the meetings between Southern, Lambert, Bayne, and the Friedman firm. Consequently, or or about January 17, 1994, Norfolk Southern began a preliminary investigation of Wright on charges of disloyalty and conduct unbecoming an employee pursuant to Rule 34 of its Collective

Bargaining Agreement. At the conclusion of the preliminary proceedings, Norfolk Southern's Assistant Shop Manager, F.W. Stevenson, advised Wright by letter that a formal investgation would be held to determine whether Wright's acts constituted "conduct unbecoming an employee and acting in a disloyal manner by asking Blacksmiths S.L. Souther, F.J. Lambert, and B.S. Bayne to meet with a [member] of a law firm . . . representing Blacksmith W.L. Jones in a lawsuit against the carrier." (J.A. 50).

On January 20, 1994, Wright and Jones filed a verified complaint in the District of South Carolina seeking both temporary and permanent injunctive relief prohibiting Norfolk Southern from conducting a formal disciplinary investigation or imposing discipline upon Wright. Soon thereafter, the parties entered into a consent order postponing the formal investigation of the charges against Wright pending resolution of the lawsuit. Following a bench trial on June 6, 1994, the district court denied Appellants' request for injunctive relief by order dated June 20, 1994. In its order the court made detailed findings of fact, determining in pertinent part that rather than involving Wright as an intermediary, Jones himself could have asked Lambert, Bayne, and Southern to meet with his legal counsel in the underlying FELA claim. The court further found that the investigation of Wright had "*not* had the effect of stifling the free flow of information relative to Jones and his case." (J.A. 61) (emphasis in original). Appellants timely appealed.

II.

We review *de novo* the narrow legal question whether Wright's function as an intermediary between Jones, his counsel, and the three other employees constitutes protected conduct under § 10 (hereinafter § 60) of the Federal Employers Liability Act, 45 U.S.C. § 60, *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.*, 984 F.2d 113, 116 (4th Cir.), *cert. denied*, 113 S. Ct. 2930 (1993).[1] This provision specifies in pertinent part:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine or not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, That nothing herein contained shall be construed to

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[1] Because this appeal is limited to a review of the district court's § 60 analysis, we do not address the propriety of Norfolk Southern's formal investigation or any resulting disciplinary action which is subject to review under the Railway Labor Act 45 U.S.C. § 151 *et seq.* (1988), and the terms of the Collective Bargaining Agreement.

> void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

45 U.S.C. § 60 (1988). The intent of this section was to prevent a railroad from denying an injured employee access to other railroad employees for the purpose of eliciting testimony helpful to his or her suit against the railroad. *Cavanaugh v. Western Maryland Ry. Co.*, 729 F.2d 289, 293 (4th Cir.), *cert. denied*, 469 U.S. 872 (1984) (counterclaim filed by a railroad in a FELA case to recover property damages sustained by reason of the sole negligence of plaintiff-employee is not precluded by § 60); *see also Reinhardt v. Benefit Trust Life Ins. Co.*, 819 F.2d 494, 495 (4th Cir. 1987) (affirming dismissal of claim because activity in question, the distribution of a pamphlet entitled "How to Protect your Right When Injured on the Job," pertained to general legal rights rather than facts related to a specific accident).

Discerning no ambiguity in the language of § 60, we look to its plain meaning.[2] Section 60 prohibits employers

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[2] Citing to a decision from the United States District Court for the District of Colorado, *Stark v. Burlington Northern, Inc.*, 538 F. Supp. 1061, 1063 (D. Colo. 1982), Appellants urge us to conclude that Wright's activities giving rise to the disciplinary action should be accorded § 60 protection. We decline, however, Appellants' implicit invitation to adopt a "balancing test" not evident in the language of § 60 but nevertheless articulated by the district court in *Stark*. *See id.* We rely rather on the unambiguous statutory language of § 60 as consistently applied both by this Court and our sister circuits. *Cavanaugh*, 729 F.2d at 293; *Reinhardt*, 819 F.2d at 495; *Woodrum v. Southern Ry. Co.*, 750 F.2d 876, 883 (11th Cir.) (decling to extend § 60 protection to

from disciplining employees for engaging in protected activity.[3] Conversely, the language defining protected employee conduct narrowly limits the application of § 60 to the actions of an employee who "furnish[es] voluntarily information to a person in interest as to the facts incident to the injury or death of any employee." 45 U.S.C. § 60.

The record below reflects that Wright acted as a liaison between Jones, his counsel, and the three potential witnesses, Lambert, Bayne, and Southern. Wright, having no personal knowledge of facts incident to Jones's injury, was not a potential witness in the underlying FELA action. Instead, Wright contacted Lambert, Bayne, and Southern on behalf of Jones and requested that they meet with Jones's counsel to disclose their understanding of the facts giving rise to Jones's FELA claim. Although perhaps of assistance to Jones in the investigation of his case, Wright's well-meaning actions lack two essential attributes necessary to receive § 60 protection. First, to

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arranging meetings between attorney and prospective FELA claimants), *cert. denied*, 474 U.S. 821 (1985); *Sheet Metal Workers Int'l Ass'n v. Burlington Northern R. Co.*, 736 F.2d 1250, 1252 (8th Cir. 1984) (attorney retained by injured worker for the purpose of pursuing a FELA claim constitutes a "person of interest" under § 60); *Hendley v. Central of Georgia R. Co.*, 609 F.2d 1146, 1153 (5th Cir. 1980) (meeting FELA plaitniff and his attorney at the location of injury and providing deposition to be used in claim falls within the protection of § 60), *cert. denied*, 449 U.S. 1093 (1981).

[3] We note the high degree of generality reflected in the term "[a]ny . . . device whatsoever." However, we look to the illustrative language relating to discipline or attempted discipline as representing the employer conduct at issue in this appeal. 45 U.S.C. § 60.

the extent Wright's actions as an intermediary can be characterized as the "furnishing" of "information," the information he provided was not "as to the facts incident to the injury" of Jones. Wright was not personally familiar with any of the facts or circumstances of Jones's accident. He acted merely as a messenger for Jones. Indeed, the district court explicitly found that, rather than involving Wright as an intermediary, Jones himself could have asked Lambert, Bayne, and Southern to meet with his legal counsel concerning the underlying FELA claim.

Second, rather than conveying information of any kind to a "person in interest," Wright merely passed a message from Jones to Lambert, Bayne, and Southern requesting that they meet with Jones's lawyer. None of these potential witnesses had an interest in the outcome of Jones's underlying FELA claim, nor were they parties in the case below. Thus, the nature of the information Wright imparted and the identity of the recipients of his message preclude us from according § 60 protection to his conduct.

III.

Finally, Appellants contend that the disciplinary proceedings initiated against Wright effectively prevented employees from voluntarily furnishing information to a person in interest. The district court, however, explicitly found that "the investigative process had *not* had the effect of stifling the free flow of information relative to Jones and his case." (J.A. 61) (emphasis in original). After careful review of the record, we cannot conclude that the

court below was clearly erroneous in reaching that factual finding. *Crawford v. Air Line Pilots Ass'n Int'l*, 992 F.2d 1295, 1297 (4th Cir.), *cert. denied*, 114 S. Ct. 195 (1993).

IV.

We therefore uphold the district court's determination that 45 U.S.C. § 60 affords no protection for Wright's actions and affirm the district court's denial of Appellants' request for permanent injunction.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
JULY 5, 1995

No. 94-1947
CA-94-178-7-021

WILLIAM L. JONES; J. H. WRIGHT

Plaintiffs - Appellants

v.

NORFOLK SOUTHERN CORPORATION; NORFOLK SOUTHERN RAILWAY COMPANY; F. W. STEVENSON; WILL HARDIN

Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

William L. Jones, and J.H. Wright, Plaintiffs, v. Norfolk Southern Corporation, Norfolk Southern Railway Company, and F.W. Stevenson, and Will Hardin, Defendants.	C/A No.: 7:94-0178-21 ORDER

The Plaintiffs, William L. Jones ("Jones") and J.H. Wright ("Wright"), filed this action seeking seeking a permanent injunction to stop a disciplinary proceeding by Norfolk Southern Railway Company against Wright. Jones and Wright allege that the institution of the disciplinary proceeding is a device which has the effect of preventing witnesses from voluntarily furnishing information to Jones concerning the facts incident to an alleged injury that Jones allegedly sustained while employed by Norfolk Southern Railway Company, and that such disciplinary procedure is in violation of 45 U.S.C. § 60 (West 1985 & Supp. 1994).

The parties stipulated to a number of facts, and these are interspersed throughout the following findings of fact. Additionally, after carefully reviewing the testimony, considering all the evidence, weighing the credibility of

the witnesses, and reviewing the exhibits, the court had made its own additional findings.

FINDINGS OF FACT[1]

1. Plaintiff Jones is employed by Norfolk Southern Railway Company as a blacksmith/welder at the Hayne Shop located in Spartanburg, South Carolina. Jones is a member of the International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers Union and works in a building at the Hayne Shop called the Reclamation Shop.

2. Plaintiff Wright is employed by Norfolk Southern Railway Company as a carman at the Hayne Shop. He is the local chairman of the Transportation Communications International Union, Brotherhood of Railway Carmen's Division and he also occupies other high ranking union positions. Wright works in a building called the Freight Shed.

3. Norfolk Southern Corporation is a corporation organized and existing pursuant to the laws of the Commonwealth of Virginia. Norfolk Southern Corporation owns one hundred percent of the common stock of Norfolk Southern Railway Company.

4. Norfolk Southern Railway Company is a corporation organized and existing pursuant to the laws of the Commonwealth of Virginia. Norfolk Southern Railway

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[1] The court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

Company is a common carrier that engages in interstate commerce and operates the Hayne Shop where railroad cars are repaired and rebuilt.

5. F.W. Stevenson ("Stevenson") is employed by Norfolk Southern Railway Company as the Assistant Manager of the Hayne Shop.

6. William Hardin ("Hardin")[2] is employed as a claim agent by Norfolk Southern Corporation.

7. The employees at the Hayne Shop can generally be classified into two categories: those who are employed on an hourly basis and are members of a union and those who are salaried employees who are not members of a union and who are generally referred to as company officials.

8. The individuals who work at the Hayne Shop and who are union members are generally employed in one of the following six crafts: carmen, blacksmiths, clerks, electricians, machinists, and pipe fitters.

9. Carmen employed at the Hayne Shop are all members of the Transportation Communications International Union, Brotherhood of Railway Carmen's Division.

10. Blacksmiths employed at the Hayne Shop are all members of the International Brotherhood of Boilermakers, Blacksmiths, Iron Ship Builders, Forgers, and Helpers Union.

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[2] Hardin's motion for judgment as a matter of law was granted at the conclusion of the plaintiff's case.

11. Jones and Wright work under a Collective Bargaining Agreement entered into between the labor organizations and Norfolk Southern Railway Company. The Collective Bargaining Agreement entered into between Norfolk Southern Railway Company and the Transportation Communications International Union, Brotherhood of Railway Carmen's Division is attached as Joint Exhibit 3.

12. The labor organizations at the Hayne Shop have local officers called local chairmen. The local chairmen represent the employees and deal with company officials of Norfolk Southern Railway Company with respect to issues that may arise under the Collective Bargaining Agreements affecting their craft, such as handling grievances and representing members of their craft in disciplinary proceedings.

13. Employees working under a Collective Bargaining Agreement are subject to various degrees of discipline under the terms of the agreement, such as letters of reprimand, loss of pay, and termination. Various types of conduct can give rise to discipline.

14. The applicable Collective Bargaining Agreement sets forth the various rights and protections in instances where discipline may be imposed.

15. Jones allegedly suffered an injury on or about May 30, 1990, while working for Norfolk Southern Railway Company. Thereafter, Jones retained the law firm of C. Marshall Friedman, P.C. ("Friedman"), to represent him and to pursue a claim against Norfolk Southern Railway Company for his alleged injuries pursuant to the

Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.* (FELA).

16. During the course of that litigation, counsel for Norfolk Southern Railway Company served interrogatories on Jones. Jones served initial responses to these interrogatories on or about June 17, 1993. A copy of plaintiff's responses to these interrogatories is attached hereto as Joint Exhibit 1. Jones thereafter supplemented his responses to these interrogatories on November 30, 1993. A copy of Jone's supplemental answers to interrogatories is attached hereto as Joint Exhibit 2. In his supplemental responses to interrogatories, Jones for the first time identified blacksmiths S.L. Southern ("Southern"), F.J. Lambert ("Lambert"), and B.S. Bayne ("Bayne") as witnesses in his FELA action.

17. Southern, Lambert, and Bayne are all employed by Norfolk Southern Railway Company as blacksmiths at Hayne Shop and each is a member of the International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers Union.

18. In April 1991, a representative of the Friedman law firm made arrangements to come to Spartanburg, South Carolina to interview potential witnesses in connection with Mr. Jones' FELA action.

19. On April 19, 1991, Jones spoke with Wright in the parking lot of the Hayne Shop. Jones asked Wright to ask Lambert, Southern, and Bayne to go to a motel that afternoon to talk to a representative from the Friedman law firm about Jones' lawsuit. That same day during lunch time, Wright went to the Reclamation Shop and

asked Lambert, Bayne, and Southern to see Jones' representative about the case. Of significance, however, is the fact that Jones could have asked Lambert, Bayne, and Southern himself. For at least seventeen years, Jones, Southern, Lambert and Bayne have been employed as blacksmiths and they have worked together at Hayne Shop in the Reclamation Shop. However, Jones chose to ask Wright to speak with Southern, Lambert, and Bayne. Until Wright spoke to Lambert, Southern, and Bayne, they did not know that a representative from the law firm representing Jones was coming to Spartanburg to talk to them.

20. On April 19, 1991, Southern, Lambert, and Bayne met with the representative from the Friedman law firm at a motel in Spartanburg, South Carolina. Wright was not present at this meeting and has not been identified by Jones as a witness in his FELA lawsuit.

21. Hardin, as a claim agent for Norfolk Southern Corporation, is responsible for conducting interviews of potential witnesses in actions brought by injured employees under FELA.

22. After Jones identified Southern, Lambert, and Bayne as witnesses in his FELA action, Hardin interviewed and took recorded statements from these individuals as is his routine.

23. On December 17, 1993, Hardin took a recorded statement from Bayne about the conditions at the Reclamation Shop. No mention was made of Wright during this interview.

24. On December 17, 1993, Hardin also took a recorded statement from Southern concerning conditions at the Reclamation Shop. During the course of the interview, Southern stated to Hardin that Wright had previously asked him to go to a local motel to meet with Jones' lawyer. No question was asked, so no answer given, at that time of Jones' solicitation of Wright.

25. After these interviews, Hardin met with Michael Payne ("Payne"), the manager of Hayne Shop. Hardin told Payne of the interviews with Bayne and Southern which included the statements made by Southern about Wright's involvement. Payne became concerned that Wright's actions might constitute an act of disloyalty.

26. On December 23, 1993, Hardin took a recorded statement from Lambert. During the interview, Lambert answered questions about the conditions at the Reclamation Shop and he also indicated that Wright had asked him to go to a motel to talk with Jones' attorney.

27. Around the middle of January, Payne was promoted to a new position in Virginia. Pending appointment of a new manager at the Hayne Shop, the senior company official at Hayne Shop was Stevenson.

28. On or about January 16, 1994, Norfolk Southern Railway Company decided to conduct a preliminary investigation on charges of disloyalty and conduct unbecoming an employee against Wright.

29. Under the terms of the applicable Collective Bargaining Agreements, an employee is ordinarily entitled to notice of any charge that is made against him.

30. Under the terms of these Collective Bargaining Agreements, an employee must be afforded a preliminary investigation. Following this preliminary investigation, the company can assess discipline or defer its decision concerning the imposition of discipline until a formal investigation is held.

31. On January 17, 1994 Stevenson commenced a preliminary investigation via a hearing with the persons involved. Wright requested lay representation to which he was entitled and, because the representation was not immediately available, the hearing was postponed.

32. On January 19, 1994 Stevenson reconvened the preliminary investigation. Wright, Hardin, Stevenson, Southern, Bayne, Lambert, Ben Johnson (Assistant Local Chairman of the Transportation International Communications Union, Brotherhood of Railway's Carmen's Division), Senior General Foreman E.A. Hill, and Tom Austin (Local Chairman of the International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers Union) were present. Again, Wright requested representation. Stevenson stated that Ben Johnson could be Wright's representative pursuant to Rule 34(b) of the Collective Bargaining Agreement. However, Johnson declined because he felt he was not qualified to represent Wright. Stevenson decided to go forward with the preliminary investigation. Hardin went over the interviews he had with Southern, Lambert, and Bayne. Hardin stated that Southern and Lambert had told him that Wright had asked them to meet with an attorney representing Jones in his FELA action. Stevenson questioned Lambert, Southern, and Bayne about the circumstances leading up to the April 19, 1991 meeting. Lambert, Southern, and

Bayne stated that Wright came to the Reclamation Shop and asked them to meet with an attorney or representative from the law firm representing Jones at a motel. At the conclusion of the hearing, Stevenson announced he was taking the matter under advisement.

33. On January 19, 1994, Stevenson wrote a letter to Wright to advise Wright that a formal hearing would be held to determine whether Wright's acts constituted "conduct unbecoming an employee and acting in a disloyal manner by asking blacksmiths Southern, Lambert, and Bayne to meet with a representative of a law firm at the Radison [sic] Hotel, now known as the Quality Hotel, Spartanburg, S.C. on some date during 1991 or 1992, which law firm was then representing Blacksmith Jones in a lawsuit against the carrier." A copy of the letter written by Stevenson is attached hereto as Joint Exhibit 4.

34. When a formal investigation is held, the employee against whom a charge is made is entitled to be represented by a union representative and to procure witnesses.

35. If discipline is assessed against an employee, the employee has the right to appeal through an appeal and grievance procedure as provided for in the applicable Collective Bargaining Agreement and the Railway Labor Act. 45 U.S.C.A. § 153 *et. seq.* (West 1986).

36. Under the Collective Bargaining Agreements and the Railway Labor Act, the highest level of appeal afforded an employee is an appeal to the National Railway Adjustment Board or a Board of Adjustment which conducts an arbitral review of the employer's claim.

37. This appeal and grievance procedure also allows an employee to obtain appropriate relief including payment for lost time and reinstatement.

38. On January 20, 1994, Wright wrote Stevenson requesting that the formal investigation be postponed, and Stevenson agreed.

39. This lawsuit was filed by Wright and Jones on January 20, 1994. Shortly thereafter a consent order was issued postponing the formal investigation until the court could hear testimony and issue a decision on the merits of the lawsuit.

40. On June 6, 1994 this court took testimony from the witnesses on the question of whether the railroad's investigation was a device which had the effect of preventing witnesses from voluntarily furnishing information concerning the facts surrounding Jones' alleged injury.

41. There is great concern among the employees caused by the investigation into Wright's conduct. The concern is based upon the fact that a high ranking union official has been placed in jeopardy of losing his job over a seemingly innocent act. The fear is that the railroad can, and will, use any excuse to terminate any employee.

a. Wright testified the employees were shocked, intimidated and scared.

b. Southern was shocked at the preliminary investigation hearing because he saw nothing wrong with what Wright did.

c. Bayne was upset because in his opinion Wright did nothing wrong.

d. John Thompson, who is not at all involved in Jones' case, was scared that if Wright could be fired, that he could lose his job "over nothing."

e. Allen Dawkins testified he was scared for his job. He wasn't sure what the charges were against Wright, but he believed them to be "minute." He is not involved in Jones' case.

f. Ben Johnson is not involved in Jones' case, but he felt scared and shocked because of a feeling of "your're next" since Wright had done "nothing wrong."

42. The concern of the employees is *not* based on Jones' claim or his ability to secure witnesses. The investigative process has *not* had the effect of stifling the free flow of information relative to Jones and his case.

a. Wright has testified as a witness for other employees and never had a problem with the railroad because of it.

b. Since the investigative proceeding began against Wright, Southern has filed a claim himself for an alleged injury. His real concern is more about his case than Jones'. He is still meeting with Jones' attorneys and he still plans to testify for Jones.

c. Bayne also has filed his own claim for alleged personal injury. His comment that he now wonders if he should "remain quiet" does not create great evidentiary weight because there is no evidence he has any further evidence to give in Jones' case that has not already been disclosed. Like Southern, he is more concerned about his own

case and not Jones'. He continues to meet with Jones' attorneys. His position is that his willingness to testify for Jones depends on the court's decision. In that regard the court notes parenthetically that the actions for examination under the statute are not those of the court.

d. Lambert has also subsequently filed his own personal injury claim. He is shocked because he could not figure out what Wright had done wrong. If Wright were not fired, it would relieve his concerns. Lambert has continued to meet with Jones' attorneys.

43. There is no evidence of any information being withheld about Jones' case.

44. There is no evidence of any witnesses in Jones' case that are not known to Jones.

45. There is no evidence of any lack of cooperation by witnesses with Jones or his attorneys.

46. There was a reasonable basis for a preliminary investigation because all of the evidence before the railroad showed that Wright had sent employees to meet as prospective witnesses with Jones' legal representative. The evidence from the interviews by Hardin was clearly susceptible of an interpretation that Wright was acting independently.

47. There was a reasonable basis to commence a formal investigation because the facts were susceptible of an interpretation that Wright had acted independently and without a legitimate reason for generating the

appearance of witnesses for Jones' claim.[3] Such a view would be based on the following evidence:

a. Jones could have given the three employees the message himself since he worked with them every day.

b. Wright was dealing with workers outside his union and outside the building where he worked.

c. The three workers were unaware of a meeting planned with Jones' legal representative.

48. The disciplinary process may validate or invalidate the charges. Even if validated, the range of sanctions if [sic] wide.

49. There was no intent on the part of the railroad to affect the furnishing of information relative to any injury or death or [sic] an employee. The actions the railroad has taken have not had this effect, even unintentionally.

50. Norfolk Southern Railway Company has adopted a number of rules that govern the conduct of its employees. Among these is General Conduct Rule 2(a), which provides as follows:

> an employee must not give any written, oral or other information about an accident to anyone but Company officers, government investigators or law enforcement officers, unless directed by court order. Others seeking information must be referred to the General Manager Casualty Claims. This rule does not prohibit an employee

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[3] This court feels it very important to note that this view of the facts is not necessarily that of the court. What is recited is the view the railroad could take of the evidence.

from giving information about injury or death of a Company employee to that employee or his legal representative.

CONCLUSIONS OF LAW

1. Under the terms of FELA, an injured railroad employee can assert a claim for damages against his employer. In such an action the plaintiff is required to prove negligence on the part of his employer in order to recover. Given this requirement, the court recognizes that an FELA plaintiff must have reasonable access to those individuals who have information concerning the facts and circumstances relating to the injury of the FELA claimant.

2. In order to assure a FELA claimant access to information regarding the facts of his injury, Congress enacted § 60 of the Federal Employers' Liability Act, 45 U.S.C.A. § 60 (West 1986). Section 60 provides in pertinent part as follows:

> Any contract rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any

> employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or both such fine and imprisonment, for each offense; Provided, that nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

3. The intent of § 60 was to attempt to equalize the access to information available to the claim departments of the railroads and to the individual FELA claimants and to prohibit the promulgation and enforcement of rules that would inhibit the free flow of information concerning the facts and circumstances of a personal injury to claimants. *See* S. Rep. No. 661, 76th Cong., 1st Sess. 2, 5 (1939).

4. An issue to be resolved here is whether Jones and Wright can maintain a civil action under 45 U.S.C. § 60 because of the initiation of disciplinary proceedings against Wright. This court concludes, under the facts of this case, that the disciplinary process does not constitute protected activity under § 60.[4] In this regard, two cases deserve mention.

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[4] Because of the ambiguity in § 60 regarding its offensive use by a plaintiff, *see Reinhardt v. Benefit Trust Life Ins. Co.*, 819 F.2d 494, 495 n.1 (4th Cir. 1987), because the facts involved an issue not yet presented to the Fourth Circuit of Appeals, because there is some conflict among the courts regarding application of the statute, *see, Cavanaugh v. Western Maryland Ry. Co.*, 729 F.2d 289, 293-94 (4th Cir. 1984); *Landfried v. Terminal R. Ass'n of St. Louis*, 721 F.2d 254, 255-56 (8th Cir. 1983), and because the relevant facts were in dispute, this Court felt it prudent to try

In *Hendley v. Central of G. R. Co.*, 609 F.2d 1146 (5th Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981), a railroad employee brought suit seeking an injunction to restrain the railroad from conducting a disciplinary investigation to determine whether an employee was guilty of disloyalty in connection with assistance the employee allegedly afforded a co-employee in a personal injury suit against the railroad. Unlike the case at bar, the plaintiff in *Hendley* was a witness in an underlying FELA action. As a result, the Fifth Circuit found that his conduct fell within the protection of § 60 because the plaintiff was furnishing information to a "person in interest." *Id.* at 1153. The actions taken by the plaintiff in *Hendley* consisted of meeting with a employee and his attorney, discussing the layout of the tracks, and giving a deposition to be used in the employee's FELA action. *Id.* at 1153. In granting the injunction, the Fifth Circuit held that the actions of the plaintiff that were the subject of the disciplinary investigation were within the protections of § 60. *Id.*

Conversely, the charges against Wright have nothing to do with his giving testimony or furnishing facts about the injury involved in Jones's FELA action. Wright is not a witness in Jones's FELA action. Rather, the purpose of the investigation is to determine whether Wright was

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the case and resolve the factual disputes first. Having done so and having concluded that § 60 does not apply, this court finds these other issues, along with the issue of standing, *see Mayon v. Southern Pacific Transp. Co.*, 805 F.2d 1250, 1253 (5th Cir. 1986), to be moot. *See Fox v. Consolidated Rail Corp.*, 739 F.2d 929, 931 (3d Cir. 1984); *Bay v. Western Pac. R. Co.*, 595 F.2d 514, 515 (9th Cir. 1979).

disloyal when he asked Southern, Lambert, and Bayne to meet with Jones's lawyer.

Subsequently in *Gonzalez v. Southern Pacific Transportation Co.*, 773 F.2d 637, 642 (5th Cir. 1985), the Fifth Circuit described its rationale in *Hendley* as follows:

> The rationale of *Hendley*, however, is that a district court should grant injunctive relief if an employee shows that he has been discharged for furnishing information to an interested person. The harm to be prevented by this remedy is . . . coercion of FELA witnesses, which, if allowed to flourish, would undercut the Act.

The facts in the case at bar are similar to the facts in *Woodrum v. Southern R. Co.*, 750 F.2d 876 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985). In *Woodrum*, the plaintiff made arrangements for a meeting between an injured railway worker and an attorney. Woodrum thereafter took the injured worker to a hotel to meet with the attorney to see if the attorney might represent the injured worker in an FELA action against the railroad. *Id.* at 883. At the time in question, the plaintiff was a member and an officer of a union. *Id.* Woodrum admitted that he had referred other members of his union to the attorney for potential representation in FELA lawsuits. *Id.* at 879. In *Woodrum*, however, the potential FELA plaintiff whom Woodrum took to the hotel to meet with the attorney was not a member of the union to which Woodrum belonged and in which he was an officer. *Id.* at 883. As a result, the railroad charged Woodrum with disloyalty because he was assisting a railway employee in commencing litigation against the railroad. Subsequently, Woodrum filed suit and sought to enjoin the railroad from conducting the investigation.

Woodrum alleged that his conduct was protected under § 60 and asked that the court enjoin the investigation. The Eleventh Circuit found that Woodrum's conduct in arranging a meeting between an employee and an attorney was not protected conduct under the terms of § 60. *Id.* at 883. The Eleventh Circuit noted that "[a]s a criminal statute, section 60 should be construed strictly, and so construed the information thus to be furnished voluntarily consists of facts relating to death or injury." *Id.*

The charges against Woodrum are similar to the charges against Wright. As in *Woodrum*, Wright is charged with assisting an injured railroad employee with litigation. Specifically, Wright is charged with disloyalty because he asked three employees of Norfolk Southern Railway Company to meet with a representative of the law firm representing Jones in his lawsuit against Norfolk Southern Railway Company. This court finds *Woodrum* of more precedential value than *Hendley*.

THEREFORE IT IS ORDERED, that the Plaintiffs' request for a permanent injunction is denied.

IT IS SO ORDERED.

/s/ William B. Traxler, Jr.
WILLIAM B. TRAXLER, JR.
UNITED STATES
DISTRICT JUDGE

June 20, 1994
Greenville, South Carolina

APPENDIX D

45 U.S.C. § 60

§ 60. Penalty for suppression of voluntary information incident to accidents; separability of provisions

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

Supreme Court, U.S.
FILED
SEP 13 1995
CLERK

No. 95-261

In The

Supreme Court of the United States

October Term, 1995

WILLIAM L. JONES AND J.H. WRIGHT,

Petitioners,

vs.

NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals for the Fourth Circuit properly conclude that the conduct of Petitioner Wright, in involving himself in an FELA action brought by an employee whom he did not represent and in which he was not a witness, was not protected under Section 60 of the Federal Employer's Liability Act, 45 U.S.C. § 60 (FELA) (1982)?

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STATUTES

§ 10 of the Federal Employers' Liability Act (FELA) 45 U.S.C. § 60 ..... *passim*

UNITED STATES SENATE REPORTS

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STATEMENT OF THE CASE

A. Background

Respondent Norfolk Southern Railway Company is a common carrier which engages in interstate commerce. (JA 47). One hundred percent of the common stock of Norfolk Southern Railway Company is owned by Respondent Norfolk Southern Corporation. (JA 47). At all times in question Norfolk Southern Railway Company maintained Hayne Shop located in Spartanburg County, South Carolina.[1] (JA 46). Among other things, railroad cars were repaired and rebuilt at Hayne Shop. (JA 80).

Personnel employed by Norfolk Southern Railway Company at Hayne Shop fall into two categories: those individuals who are employed on an hourly basis and who are represented by a union; and those individuals who are salaried employees, who are not represented by a union, and who are generally referred to as company officials. Both Plaintiffs are members of the former category.

Those individuals who are employed at Hayne Shop and who are represented by a union are generally employed in one of six crafts. These crafts include carmen, blacksmiths, clerks, electricians, machinists, and pipe fitters. (JA 220, 239). Carmen employed at Hayne Shop are represented by the Transportation Communications International Union, Brotherhood of Railway Carmen's Division (BRC). (JA 46-47). Blacksmiths employed

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[1] Hayne Shop was closed on July 3, 1995. Both Petitioners continue to work for Respondent Norfolk Southern Railway Company but now work at other locations.

at Hayne Shop are represented by the International Brotherhood of Boilermakers, Blacksmiths, Iron Ship Builders, Forgers, and Helpers Union (IBB). (JA 46).

Petitioner William L. Jones was employed by Defendant Norfolk Southern Railway Company as a blacksmith/welder at Hayne Shop. (JA 46). Petitioner Jones worked in a building known as the "Reclamation Shop" at Hayne Shop. (JA 106). As a blacksmith, Jones is represented by the IBB. (JA 46).

Petitioner J.H. Wright was employed by Respondent Norfolk Southern Railway Company as a carman at Hayne Shop. (JA 46). Petitioner Wright worked in a separate building known as the "Freight Shed" at Hayne Shop. (JA 105). He was the local chairman of the BRC. (JA 46-47, 80). As such, Petitioner Wright represented carmen and painters; he did not represent blacksmiths.

The terms and conditions of employment of those individuals at Hayne Shop who are employed on an hourly basis and who are represented by a union are set forth in collective bargaining agreements entered into between the various labor organizations and Norfolk Southern Railway Company. (JA 81, 302-319). Certain of the labor organizations representing employees at Hayne Shop have local officers called local chairmen. For example, the blacksmiths local chairman, Tom Austin, is an employee at Hayne Shop. (JA 67, 77).

The local chairman often deals with company officials at Hayne Shop with respect to issues that arise under applicable collective bargaining agreements affecting their craft. The duties of a local chairman include

handling grievances and representing members of their craft in disciplinary proceedings. (JA 80, 109, 302-319).

Employees working under a collective bargaining agreement at Hayne Shop are subject to various degrees of discipline (for example, letters of reprimand, suspension, termination, etc.) under the terms of applicable collective bargaining agreements. Matters which can give rise to discipline include absenteeism, violation of company rules, improper performance, insubordination, conduct unbecoming an employee, and disloyalty. (JA 108, 110, 111).

Under the terms of applicable collective bargaining agreements, employees at Hayne Shop are accorded various rights and protections in instances where discipline may be imposed. (JA 111-116, 223, 240, 264, 302-319). Under the terms of both the BRC and the IBB collective bargaining agreements an employee is ordinarily entitled to notice of any charge that is made against him. (*Id.*)

Under the terms of both the BRC and the IBB collective bargaining agreements, an employee must be afforded an opportunity for a preliminary investigation. (JA 111-116, 309-319). Following the preliminary investigation the company can assess discipline or defer its decision concerning imposing discipline until a formal investigation is held. (*Id.*) When a formal investigation is held, the employee against whom a charge is made is entitled to various rights and protections including the right to be represented by a union representative and the right to procure witnesses. (*Id.*)

If discipline is assessed against an employee at the conclusion of either a preliminary investigation or a formal investigation, the aggrieved employee has the right to pursue various levels of appeal through an appeal and grievance procedure provided under the terms of the Collective Bargaining Agreement and the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1982). The highest level of appeal afforded an aggrieved employee under the terms of a Collective Bargaining Agreement and the Railway Labor Act is an appeal to the National Railroad Adjustment Board or a Board of Adjustment (which includes a Public Law Board) which conducts an arbitral review of the employee's claim. *Id.* Through this appeal and grievance process an aggrieved employee can obtain appropriate relief including payment for lost time, reinstatement, and the like. *Id.*

Respondent Norfolk Southern Railway Company has adopted a number of rules that govern the conduct of its employees. (JA 111). Among these is General Conduct Rule 2(a). (JA 121, 242, 301). General Conduct Rule 2(a) provides as follows:

> An employee must not give any written, oral or other information about an accident to anyone but Company officers, government investigators or law enforcement officers, unless directed by court order. Others seeking information must be referred to the General Manager Casualty Claims. This rule does not prohibit an employee from giving information about injury or death of a Company employee to that employee or his legal representative.

(JA 121, 301).

B. Petitioner Jones' FELA Action

On or about May 30, 1990, Petitioner Jones allegedly suffered an injury while working as a blacksmith for Respondent Norfolk Southern Railway Company. (JA 47). Petitioner Jones retained the law firm of C. Marshall Friedman, P.C., to represent him and to pursue a claim against Respondent Norfolk Southern Railway Company for his alleged injuries pursuant to the Federal Employer's Liability Act (FELA). (JA 47).

In approximately mid-April 1991, Petitioner Jones approached Petitioner Wright in the parking lot before work. Petitioner Jones (a blacksmith) asked Wright (a carman) if Wright would speak with blacksmiths Southern, Lambert, and Bayne. Petitioner Jones asked Wright to ask the three blacksmiths to meet with a representative from Jones' attorneys' office. (JA 86-88, 138-139, 141-143).

Jones had worked with blacksmiths Southern, Lambert, and Bayne in the Reclamation Shop for approximately seventeen years. (JA 143, 144). Nonetheless, Jones asked Wright to make arrangements for the three blacksmiths to meet with his lawyers' representative rather than do so himself.

Later that same day, Petitioner Wright left the Freight Shed where he worked and went to the Reclamation Shop. (JA 88-90). At the Reclamation Shop, Wright asked blacksmiths Southern, Lambert, and Bayne to go to a local motel in Spartanburg, South Carolina on or about April 19, 1991, to meet with a representative from the Friedman law firm. (JA 161, 278, 293).

On or about December 19, 1991, the Friedman law firm filed a lawsuit on Jones' behalf against defendant Norfolk Southern Railway Company in Memphis, Tennessee. In the lawsuit Jones sought to recover damages under the FELA for the injury that he allegedly suffered. During the course of that litigation, counsel for Norfolk Southern Railway Company served interrogatories on Petitioner Jones. (JA 48). Petitioner Jones' counsel served initial responses on or about June 17, 1993. (JA 48). In his initial responses Jones failed to identify persons with knowledge concerning alleged negligence on the part of defendant Norfolk Southern. (JA 35-38).

Petitioner Jones' attorneys thereafter filed supplemental responses to defendants' interrogatories on November 30, 1993. (JA 40-41, 48). Among the witnesses identified by plaintiff Jones on November 30, 1993, were F. J. Lambert, S. L. Southern, and B. S. Bayne, all of whom are blacksmiths who worked with Petitioner Jones in the Reclamation Shop. (*Id.*) Significantly, Petitioner J. H. Wright was never identified by Petitioner Jones as a witness in Jones' FELA action. (JA 144).

Respondent Will Harden is employed as a Claim Agent in the Casualty Claims Department of Norfolk Southern Corporation.[2] (JA 47). As a Claim Agent, Respondent Harden is responsible for conducting interviews of potential witnesses in an action brought by an

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[2] At trial, the United States District Court granted Defendant Harden's motion for a directed verdict. On appeal to the Court of Appeals for the Fourth Circuit, Petitioners did not contest the District Court's dismissal of Harden. Therefore, the dismissal of Harden is not before this Court.

injured employee under the terms of the FELA. (JA 201-202).

Shortly after Jones identified Southern, Lambert, and Bayne as witnesses in his FELA action, Respondent Harden was asked to interview and take recorded statements from these three individuals. (JA 204). At 2:00 p.m. on December 17, 1993, Harden took a recorded statement from B. S. Bayne. (JA 204, 205, 272-277). Bayne answered a number of questions about conditions in the Reclamation Shop at Hayne Shop. No mention was made of Petitioner J. H. Wright during the course of Bayne's interview. (*Id.*)

At 2:30 p.m. on December 17, 1993, Respondent Harden took a recorded statement from S. L. Southern. (JA 206, 278-285). Southern answered a number of questions concerning conditions in the Reclamation Shop. (*Id.*) During the course of that interview Southern, a blacksmith, advised Harden that Jack Wright, local chairman for the carmen, had previously asked him to go to a local motel to meet with Jones' lawyer. (*Id.*)

At 2:15 p.m. on December 23, 1993, Respondent Harden took a recorded statement from F. J. Lambert. (JA 208-209, 286-295). During the interview Lambert answered a number of questions about conditions in the Reclamation Shop. During the course of the interview Lambert, a blacksmith, also indicated that Wright, local chairman for the carmen, had asked him to go to a local motel to give a deposition or a statement to Jones' attorneys. (*Id.*)

On or about January 16, 1994, Respondent Norfolk Southern Railway Company decided to conduct a preliminary investigation on charges of disloyalty and conduct unbecoming an employee against Petitioner Wright because of his assistance with plaintiff Jones' FELA lawsuit against the company. A preliminary investigation is provided for under Rule 34 of the BRC Collective Bargaining Agreement. On January 17, 1994, Respondent F. W. Stevenson, assistant shop manager at Hayne Shop, convened a preliminary investigation. (JA 244-245). The preliminary investigation was postponed at Petitioner Wright's request. (JA 244-245).

Following the postponement a decision was made to reconvene the preliminary investigation. (*Id.*) On January 19, 1994, Respondent Stevenson reconvened the preliminary investigation. The investigation was held on charges against Wright for acting in a disloyal manner and for conduct unbecoming an employee. (JA 243). Respondent Stevenson, Respondent Harden, Petitioner Wright, Mr. Southern, Mr. Bayne, Mr. Lambert, and Senior General Foreman E. A. Hill were present. (JA 210-211, 247-248). Also present were Ben Johnson, Assistant Local Chairman for the Carmen, and Tom Austin, Local Chairman for the Blacksmiths. (JA 210-211, 247-248).

During the preliminary investigation, Respondent Harden went over the circumstances of his interviews with Southern, Lambert, and Bayne. Harden stated that Southern and Lambert told him in the course of his interviews that Wright, local chairman for the carmen, had asked them to meet with the attorney representing Jones, a blacksmith, in his FELA action. (JA 210-211, 247). Also during the preliminary investigation, Southern,

Lambert, and Bayne stated that Wright came to the Reclamation Shop where the blacksmiths worked and asked the three of them to go to a local motel to meet with an attorney or representative from the law firm representing Jones. (App. 211-212).

During the preliminary investigation Wright denied asking the three blacksmiths to meet with an attorney or representative from the law firm representing Jones. (JA 212, 248). At trial, however, Petitioner Wright conceded that he did make arrangements for the three blacksmiths to meet with Jones' attorneys' representative. (JA 87).

At the conclusion of the preliminary investigation Respondent Stevenson announced that he would take the matter under advisement. He did not render a decision or assess any discipline against Petitioner Wright. (JA 249). Pursuant to provisions of Rule 34(e) of the BRC Collective Bargaining Agreement, Respondent Norfolk Southern Railway Company decided to withhold a decision and any discipline on the charges against Wright pending a formal investigation. (JA 249, 314, 315).

On January 19, 1994, Respondent Stevenson wrote a letter to Petitioner Wright to advise Petitioner Wright that a formal investigation would be held to determine whether Petitioner Wright's acts constituted "conduct unbecoming an employee and acting in a disloyal manner by asking blacksmiths S. L. Southern, F. J. Lambert, and B. S. Bayne to meet with a representative of a law firm at the Radisson Hotel, now known as the Quality Hotel, Spartanburg, South Carolina on some date during 1991 and 1992, which law firm was then representing blacksmith W. L. Jones in a lawsuit against the carrier." (JA 50).

On January 20, 1994, Petitioner Wright wrote Respondent Stevenson and asked that the formal investigation be postponed. (JA 44, 51). On January 21, 1994, Respondent Stevenson wrote Petitioner Wright and agreed to postpone the formal investigation. (JA 45, 51). This lawsuit followed.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Fourth Circuit is consistent with prior decisions of the other Courts of Appeal which have addressed this issue including the Eleventh and Fifth Circuits in *Hendley v. Central of Georgia Railroad*, 609 F.2d 1146 (5th Cir. 1980), *Woodrum v. Southern Ry. Co.*, 750 F.2d 876 (11th Cir. 1985) and *Gonzalez v. Southern Pac. Transp. Co.*, 773 F.2d 637 (5th Cir. 1985). The decision of the Court of Appeals for the Fourth Circuit is also consistent with the intent underlying Section 60 of the FELA. Petitioner Wright was not a witness concerning the facts and circumstances of Petitioner Jones' FELA action nor did Wright furnish information to a person in interest. Therefore, Petitioner's Petition for a Writ of Certiorari should not be granted as there is no conflict among the Courts of Appeal on this issue and there are no other special or important reasons which call for an exercise of this Court's power of supervision.

ARGUMENT

I. Petitioner's Petition for a Writ of Certiorari should not be granted.

Petitioner's Petition for a Writ of Certiorari should not be granted as there are no special or important reasons which call for an exercise of this Court's power of supervision. The opinion of the Court of Appeals for the Fourth Circuit is consistent with the prior decisions of other Courts of Appeal. The decision is also consistent with the express statutory language and underlying intent of Section 60.

A. The opinion of the Court of Appeals is consistent with the decisions of other appellate courts.

Petitioners assert that the opinion of the Court of Appeals for the Fourth Circuit conflicts with decisions on the same issue rendered by other Courts of Appeal. Petitioners are incorrect. The decision of the Court of Appeals is consistent with the prior decisions of other appellate courts.

In *Woodrum v. Southern Ry. Co.*, 750 F.2d 876 (11th Cir. 1985), the Court of Appeals for the Eleventh Circuit likewise held that Section 60 protects railroad employees only when they furnish "facts incident to the injury or death of any employee" to an interested party.

In that case, Woodrum had been required to attend an investigation on charges against him for "conduct disloyal and unbecoming an employee." Woodrum was charged with arranging for a fellow employee, Eddie Lee

Robinson, to meet with an attorney specializing in FELA actions. Woodrum was not a witness concerning Robinson's alleged injury.

The Defendant in *Woodrum* learned of Woodrum's participation through the regular activities of its claim agent. Robinson advised the claim agent that Woodrum had arranged for him to meet with Burge, the FELA attorney. Importantly, Woodrum was not a member of the same labor organization as Robinson.

The Court of Appeals for the Eleventh Circuit held that the conduct of Woodrum was not protected conduct under Section 60 of the FELA. The court reasoned that the charges instituted against Woodrum did not stem from his activities as a potential witness in Robinson's FELA action. Rather, the charges against Woodrum related solely to his participation in arranging a meeting between Robinson and attorney Burge. While the court recognized that labor unions maintain lists of approved attorneys, the court made specific mention of the fact that Woodrum and Robinson were not members of the same union nor was Burge an attorney appearing on the list.

Similarly, the Court of Appeals for the Eleventh Circuit in *Hendley v. Central of Georgia Railroad*, 609 F.2d 1146 (5th Cir. 1980), affirmed a grant of injunctive relief against a railroad to preclude the carrier from initiating an investigation. In that case, the court held that the conduct was protected because the employee was a witness in an FELA action who attempted to furnish information to a person in interest.

In *Hendley* the Defendant initiated a formal investigation against Hendley for "meeting Razook [an FELA

plaintiff] and his attorney on the [railroad] property, discussing the physical layout of the tracks, and giving a deposition to be used in the case." *Id.* at 1153. The Court of Appeals held that the actions of Hendley constituted conduct which falls within the protection of Section 60. *Id.*

The *Hendley* court addressed "whether a federal court also has jurisdiction, when an FELA case has been concluded, to enjoin a disciplinary hearing used by a railroad for retaliatory purposes in violation of § 60." *Id.* at 1150. The court concluded that the federal court could issue the injunction because Hendley was a witness in Razook's FELA action. Hendley had given deposition testimony in the case and the actions which the court deemed protectable related to Hendley's testimony and his assistance in furnishing information concerning the facts and circumstances surrounding Razook's accident. Specifically, Hendley assisted Razook and his counsel in analyzing the layout of the tracks on which Razook was working when he was injured.

In a later case, *Gonzalez v. Southern Pac. Transp. Co.*, 773 F.2d 637 (5th Cir. 1985), the Court of Appeals for the Fifth Circuit again recognized that the purpose of Section 60 "is to prohibit the 'overwhelming coercive effect' that disciplinary actions by railroads have on an employee's willingness to testify in a FELA case." *Id.* at 641. Like the Fourth Circuit here, the court held that, in order to be protected, a railroad employee must be disciplined for furnishing information in an FELA case. *Id.* at 641 (quoting *Hendley*, 609 F.2d at 1153).

As all of these cases indicate, the decision of the Court of Appeals for the Fourth Circuit is consistent with the decisions of other Courts of Appeal which have been called upon to interpret the scope of protection of Section 60. The courts have uniformly recognized that the protection of Section 60 is limited to persons who are witnesses concerning the facts and circumstances of a co-employee's FELA action. Further, the courts have consistently held that such conduct is protected only if information furnished by a witness is supplied to a person in interest.

In its opinion here, the Court of Appeals for the Fourth Circuit underscored the fact that its decision is consistent with decisions on the same matter from other circuits. In distinguishing *Stark v. Burlington Northern, Inc.*, 538 F. Supp. 1061 (D. Colo. 1982), a district court opinion relied upon by Petitioners, the Court of Appeals wrote:

> We rely rather on the unambiguous statutory language of § 60 as consistently applied both by this Court and our sister circuits.

Opinion at A-5 n.2.

In the present matter, the District Court and the Court of Appeals properly concluded that Petitioner Wright was not a witness in Petitioner Jones' FELA action. Further, the District Court and the Court of Appeals properly determined that Petitioner Wright did not furnish information to a "person in interest." Both Courts properly applied the principles underlying the FELA in a manner consistent with decisions from other

Courts of Appeal and held that Petitioner Wright's conduct does not constitute protected conduct under Section 60.

B. The opinion of the Court of Appeals is consistent with the language of Section 60 and the underlying policy considerations behind the statute.

Section 60 of the FELA provides in pertinent part:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense; Provided, that nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

45 U.S.C. § 60.

The Act specifically indicates that its provisions protect "any person" who voluntarily furnishes "information to a person in interest". 45 U.S.C. § 60. Additionally, the legislative history of § 60 plainly establishes the well-defined, but limited purpose of that section: "The purpose of the amendment [which became FELA § 10] under consideration is to . . . *permit those who have information concerning the facts and circumstances of a personal injury to give statements to the injured employee* or his dependents, or to someone authorized to represent him or them." S. Rep. No. 661, 76 Cong., 1st Sess. 5 (1939) (emphasis added).

Here, the Court of Appeals properly found Section 60 to be clear and unambiguous on its face. The Court of Appeals then addressed the narrow scope of Section 60. The Court wrote:

> Discerning no ambiguity in the language of § 60, we look to its plain meaning. Section 60 prohibits employers from disciplining employees for engaging in protected activity. Conversely, the language defining protected employee conduct narrowly limits the application of § 60 to the actions of an employee who "furnish[es] voluntarily information to a person in interest as to the facts incident to the injury or death of any employee." 45 U.S.C. § 60.

Opinion pp. A6-A7. The Court of Appeals correctly concluded that Section 60 was intended to prevent a railroad from denying an injured employee access to other employees who could potentially provide useful testimony in his or her FELA lawsuit.

The Court of Appeals then turned to the facts of this case. The Court concluded that Section 60 "affords no

protection for Wright's actions. . . . " Opinion at A-9. The Court based its decision on two key facts. First, the Court determined that Petitioner Wright is not a person whom Section 60 was intended to protect. "Wright, having no personal knowledge of facts incident to Jones's injury, was not a potential witness in the underlying FELA action." Opinion at A-7.

Second, the Court of Appeals concluded that the recipient of any communication from Wright was not a "person in interest" under the statute. Wright simply conveyed a message to potential witnesses in Jones's FELA action. Wright did not convey any information of any kind to either Jones or his attorney. Given this, the Court observed: "Thus, the nature of the information Wright imparted and the identity of the recipients of his message preclude us from according § 60 protection to his conduct." Opinion at A-8. Thus, the Court of Appeals properly concluded that the conduct of Petitioner Wright did not constitute protected conduct under the express language of or intent underlying Section 60 because Petitioner Wright was not a witness in Jones' FELA action nor did Petitioner Wright furnish information to a "person in interest." Opinion at A-8.

CONCLUSION

Based upon the foregoing authorities and argument, Respondents respectfully submit that the Petition for a Writ of Certiorari must be denied. The opinion of the Court of Appeals for the Fourth Circuit is consistent with not only the express language of and intent underlying Section 60 of the FELA, but also the decisions of the other Courts of Appeal. There are no other special or important reasons which call for an exercise of this Court's power of supervision.

Respectfully submitted,

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